to make the last finding.

The arresting officer had allegedly viewed the illegal act for what could have been less than a second and there was no evidence of spoken communication between petitioner and his co-defendant at the time or of a pre-arranged meeting. Hence it seems apparent that a reasonable doubt as to guilt might have existed in the minds of the jury, on this testimony alone, because of the improbability of two strangers engaging in such conduct without pre-arrangement.

The arresting officer's testimony of alleged illegal acts of petitioner and his co-defendant preceeding the alleged illegal act had a tendency to dispel that doubt since the acts were suggestive of a mutual, silent solicitation. On the other hand, the acts were at best ambiguous and had an alternative, innocent explanation.

It follows that the erroneously introduced admissions were of crucial effect, or, at least, reasonably could have been of crucial effect in eliminating doubt in the minds of the jury.

Hence, under the Chapman rule, there was no alternative but to find the error reversible. It is therefore submitted that the state appellate Court misapplied the Chapman rule even though giving lip service to it.

PRAYER

Wherefore, Petitioner prays that this Honorable Court grant the Petition for Writ of Certiorari.

Respectfully submitted,

I. A. KANAREK

Attorney for Petitioner
Guilford Dinsmuir Shaw

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GUILFORD DINSMUIR SHAW,
Petitioner-Appellant,

v.

PETER PITCHESS, Sheriff of
Los Angeles County,
Respondent-Appellee.

No. 25,511

[March 24, 1971]

Appeal from the United States District Court
Central District of California

Before: WRIGHT, CARTER and TRASK, Circuit Judges

PER CURIAM:

Appellant was found guilty and sentenced for the crime of oral copulation in violation of California Penal Code, § 288a. The state Court of Appeals affirmed the conviction in an unreported decision. Certiorari was denied by the United States Supreme Court, 395 U.S. 211 (1969).

Appellant then petitioned for writ of habeas corpus in the district court below. The district court found no factual issues were involved, no evidentiary hearing was required and that the state courts had adequately disposed of the matter. The district court denied relief in an order entered on November 26, 1969, and incorporated much of the text of the unreported opinion of the state Court of Appeals.

On the basis of the district court's order in *Shaw v. Pitchess*, (C.D. Cal. 1969) ——F. Supp. ——, we affirm.

APPENDIX B

IN THE MUNICIPAL COURT OF SANTA MONICA JUDICIAL DISTRICT
COUNTY OF LOS ANGELES, STATE OF CALIFORNIA

COMPLAINT
FELONY

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,
v.
GUILFORD DISMUIR SHAW and
JIMMY GONZALES PERALTA,
Defendants.

M. C. No.
Filed 3/22/65
Clerk of the above entitled Court, County of Los Angeles, State of California.
By 1127 Deputy Clerk
S. C. No.

Personally appeared before me this 22nd day of March, 1965
C. Sutter
of the County of Los Angeles, who being first duly sworn on oath, upon information and belief complains and says:

That on or about the 19th day of March, 1965 at and in the County of Los Angeles, State of California, the crime of VIOLATION OF SECTION 286a, Penal Code of California, a felony, was committed by

GUILFORD DUSMUIR SHAW and JIMMY GONZALES PERALTA,

who, at the time and place last aforesaid, did willfully, unlawfully and feloniously participate in the act of copulating the sexual organ, to wit, the penis, of him, the said JIMMY GONZALES PERALTA, with the mouth of GUILFORD DUSMUIR SHAW.

Said complainant therefore prays that a warrant may be issued for the arrest of the defendant who may then be dealt with according to law.

C. Sutter

Subscribed and sworn to before me on
March, 22, 1965

Judge of the above entitled Court

EVELLE J. YOUNGER
Issued by District Attorney
By
GILBERT C. CATON Deputy
Bail Recommended
$ 1,000.00 + 100 P.N.
WITNESSES

C. Sutter, SMPD

EXHIBIT A

THE DOCUMENT TO WHICH THIS CERTIFICATE IS ATTACHED IS A FULL, TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE AND OF RECORD IN MY OFFICE.
ATTEST MAR 1? 19..
WILLIAM G. SHARP County Clerk and Clerk of the Superior Court of the State of California, for the County of Los Angeles.
BY DEPUTY

(SMPD)

BEST AVAILABLE COPY

APPENDIX C

APPENDIX C (a)

§ 813. Warrant; issuance

When a complaint is filed with a magistrate charging a public offense originally triable in the superior court of the county in which he sits, if such magistrate is satisfied from the complaint that the offense complained of has been committed and that there is reasonable ground to believe that the defendant has committed it, he must issue a warrant for the arrest of the defendant; provided, that when the magistrate is a judge of the justice court, he may issue such a warrant only upon the concurrence of the district attorney of the county in which he sits or the Attorney General of the State of California.

(Enacted 1872. Amended by Stats.1951, c. 1674, p. 3834, § 27; Stats. 1963, c. 1712, p. 3362, § 2, effective July 17, 1963.)

§ 814. Warrant; form

A warrant of arrest issued under Section 813 may be in substantially the following form:

County of ———

The people of the State of California to any peace officer of said State:

Complaint on oath having this day been laid before me that the crime of ——— (designating it generally) has been committed and accusing ——— (naming defendant) thereof, you are therefore commanded forthwith to arrest the above named defendant and bring him before me at ——— (naming the place), or in case of my absence or inability to act, before the nearest or most accessible magistrate in this county.

Dated at ——— (place) this ——— day of ———, 19—.

———

(Signature and full official title of magistrate.)

(Enacted 1872. Amended by Stats.1951, c. 1674, p. 3834, § 28.)

§ 806. Proceeding for examination before magistrate; complaint; formalities; contents; construction and effect

A proceeding for the examination before a magistrate of a person on a charge of an offense originally triable in a superior court must be commenced by written complaint under oath subscribed by the complainant and filed with the magistrate; provided, that when such magistrate is a judge of the justice court, the proceeding must be commenced by a written complaint under oath subscribed by the complainant, filed with the magistrate and concurred in by the district attorney of the county in which he sits or the Attorney General of the State of California. Such complaint may be verified on information and belief. When the complaint is used as a pleading to which the defendant pleads guilty under Section 859a of this code, the complaint shall contain the same allegations, including the charge of prior conviction or convictions of crime, as are required for indictments and informations and, wherever applicable, shall be construed and shall have substantially the same effect as provided in this code for indictments and informations.

(Enacted 1872. Amended by Code Am.1880, c. 47, p. 12, § 11; Stats. 1935, c. 217, p. 873, § 2; Stats.1951, c. 1674, p. 3834, § 25; Stats.1963, c. 1712, p. 3362, § 1, eff. July 17, 1963.)

§ 859. Offense within original jurisdiction of superior court; appearance before magistrate; copy of complaint; counsel; minors

When the defendant is charged with the commission of a public offense, over which the superior court has original jurisdiction, by a written complaint subscribed under oath and on file in a court within the county in which the public offense is triable, he shall, without unnecessary delay, be taken before a magistrate of the court in which such complaint is on file. The magistrate shall immediately deliver to him a copy of the complaint, inform him of his right to the aid of counsel, ask him if he desires the aid of counsel, and allow him a reasonable time to send for counsel; and the magistrate must, upon the request of the defendant, require a peace officer to take a message to any counsel whom the defendant may name, in the judicial district in which the court is situated. The officer must, without delay and without fee, perform that duty. If the defendant desires and is unable to employ counsel, the court must assign counsel to defend him. If it appears that the defendant may be a minor, the magistrate shall ascertain whether such is the case, and if the magistrate concludes that it is probable that the defendant is a minor, he shall immediately either notify the parent or guardian of the minor, by telephone or messenger, of the arrest, or appoint counsel to represent the minor.

(Enacted 1872. Amended by Stats.1927, c. 615, p. 1044, § 1; Stats. 1935, c. 141, p. 492, § 1; Stats.1951, c. 1160, p. 2958, § 1; Stats.1951, c. 1608, p. 3613, § 12; Stats.1957, c. 209, p. 871, § 1; Stats.1959, c.

§ 859a. Non-capital felony; defendant represented by counsel; procedure to take plea; plea of guilty to offense charged or lesser offense; commitment; certification to superior court

If the public offense charged is a felony not punishable with death, the magistrate shall immediately upon the appearance of counsel for the defendant read the complaint to the defendant and ask him whether he pleads guilty or not guilty to the offense charged therein and to a previous conviction or convictions of crime if charged; thereupon, or at any time thereafter, while the charge remains pending before the magistrate and when his counsel is present, the defendant may, with the consent of the magistrate, and the district attorney or other counsel for the people, plead guilty to the offense charged or to any other offense the commission of which is necessarily included in that with which he is charged, or to an attempt to commit the offense charged and to the previous conviction or convictions of crime if charged; and upon such plea of guilty, the magistrate may then fix a reasonable bail as provided by this code, and upon failure to deposit such bail or surety, shall immediately commit the defendant to the sheriff and certify the case, including a copy of all proceedings therein and such testimony as in his discretion he may require to be taken, to the superior court, and thereupon such proceedings shall be had as if such defendant had pleaded guilty in such court. The foregoing provisions of this section shall not be construed to authorize the receiving of a plea of guilty from any defendant not represented by counsel. If the defendant subsequently files a written motion to withdraw the plea under Section 1018, the motion shall be heard and determined by the court before which the plea was entered.

(Added by Stats.1935, c. 141, p. 493, § 2. Amended by Stats.1965, c. 2022, p. 4587, § 1; Stats.1965, c. 2023, p. 4588, § 2.)

§ 948. Forms; rules for determination of sufficiency of pleadings

FORM OF AND RULES OF PLEADING. All the forms of pleading in criminal actions, and the rules by which the sufficiency of pleadings is to be determined, are those prescribed by this Code.

(Enacted 1872.)

Derivation: Stats.1851, c. 29, p. 237, § 235.

§ 949. First pleading by people; superior court; inferior courts

The first pleading on the part of the people in the superior court is the indictment, information, accusation or the complaint in any case certified to the superior court under the provisions of Section 859a or the complaint filed in accordance with the provisions of Section 702 of the Welfare and Institutions Code.[1] The first pleading on the part of the people in all inferior courts is the complaint except as otherwise provided by law.

(Enacted 1872. Amended by Code Am.1880, c. 47, p. 12, § 14; Stats. 1951, c. 1674, p. 3836, § 42.)

[1] Repealed 1961. See, now, § 272.

APPENDIX C (b)

§ 288a. Perversion; copulation with the mouth; punishment

Any person participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the state prison for not exceeding 15 years, or by imprisonment in the county jail not to exceed one year; provided, however, whenever any person is found guilty of the offense specified herein, and it is charged and admitted or found to be true that he is more than 10 years older than his coparticipant in such an act, which coparticipant is under the age of 14, or that he has compelled the other's participation in such an act by force, violence, duress, menace, or threat of great bodily harm, he shall be punished by imprisonment in the state prison for not less than three years. The order of commitment shall expressly state whether a person convicted hereunder is more than 10 years older than his coparticipant and whether such coparticipant is under the age of 14. The order shall also state whether a person convicted hereunder has compelled coparticipation in his act by force, violence, duress, menace, or threat of great bodily harm.
(Added by Stats.1921, c. 848, p. 1633, § 2. Amended by Stats.1950, 1st Ex.Sess., c. 56, p. 512, § 1; Stats.1952, 1st Ex.Sess., c. 23, p. 380, § 3; Stats.1955, c. 274, p. 729, § 1.)

APPENDIX C (c)

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX C (d)

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX C (e)

§ 290. Registration of sex offenders

Duty to register; time. Any person who, since the first day of July, 1944, has been or is hereafter convicted in the State of California of the offense of assault with intent to commit rape or the in-

famous crime against nature, under Section 220, or of any offense defined in Sections 266, 267, 268, 285, 286, 288, 288a, subdivision 1 of Section 647a, subdivision 3 or 4 of Section 261, subdivision (a) or (d) of Section 647, or subdivision 1 or 2 of Section 314 of this code, or of any offense involving lewd and lascivious conduct under Section 272 of the Penal Code; or any person who since said date has been or is hereafter convicted of the attempt to commit any of the above-mentioned offenses; or any person who since said date or at any time hereafter is discharged or paroled from a penal institution where he was confined because of the commission or attempt to commit one of the above-mentioned offenses; or any person who since said date or at any time hereafter is determined to be a sexual psychopath under the provisions of Chapter 4 of Part 1 of Division 6 of the Welfare and Institutions Code; or any person who has been since said date or is hereafter convicted in any other state of any offense which, if committed or attempted in this state, would have been punishable as one or more of the above-mentioned offenses shall within 30 days after the effective date of this section or within 30 days of his coming into any county or city, or city and county in which he resides or is temporarily domiciled for such length of time register with the chief of police of the city in which he resides or the sheriff of the county if he resides in an unincorporated area.

Notice of duty to register; prisoner or inmate. Any person who, after the first day of August, 1950, is discharged or paroled from a jail, prison, school, road camp, or other institution where he was confined because of the commission or attempt to commit one of the above-mentioned offenses or is released from a state hospital to which he was committed as a sexual psychopath under the provisions of Chapter 4 of Part 1 of Division 6 of the Welfare and Institutions Code shall, prior to such discharge, parole, or release, be informed of his duty to register under this section by the official in charge of the place of confinement or hospital and the official shall require the person to read and sign such form as may be required by the State Bureau of Criminal Identification and Investigation, stating that the duty of the person to register under this section has been explained to him. The official in charge of the place of confinement or hospital shall obtain the address where the person expects to reside upon his discharge, parole, or release and shall report such address to the State Bureau of Criminal Identification and Investigation. The official in charge of the place of confinement or hospital shall give one copy of the form to the person, and shall send two copies to the State Bureau of Criminal Identification and Investigation, which bureau, in turn, shall forward one copy to the appropriate law enforcement agency having local jurisdiction where the person expects to reside upon his discharge, parole, or release.

Notice of duty to register; probationer or one paying fine. Any person who after the first day of August, 1950, is convicted in the

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-369

GUILFORD DINSMUIR SHAW,

Petitioner,

vs.

PETER PITCHESS, Sheriff of Los Angeles County,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-369

GUILFORD DINSMUIR SHAW,

Petitioner,

vs.

PETER PITCHESS, Sheriff of Los Angeles County,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the District Court is reported at 324 F.Supp. 781. The opinion of the Court of Appeal for the Ninth Circuit (App. A of Petition) is reported at 440 F.2d 412.

Jurisdiction

The jurisdictional requisites are adequately set forth in the Petition.

Questions Presented

1. Was the felony complaint upon which petitioner was bound over for trial in the California Superior Court deficient under federal standards?

2. Is California Penal Code section 288a, which makes the act of oral copulation a crime, unconstitu-

tional as applied to two adult males who engage in such activity in an open toilet stall located in the public restroom of a restaurant?

3. Were petitioner's Fourth Amendment rights violated when a police officer observed the act of oral copulation through a false ventilator installed in the wall of the restroom?

4. Did the California and federal courts correctly hold that the admission of an extrajudicial statement of petitioner's codefendant was harmless beyond a reasonable doubt?

Statutes Involved

The pertinent sections of the California Penal Code are adequately set forth in Appendix C to the Petition.

Statement of the Case

This petition for a writ of certiorari is petitioner's second attempt to have this Court review his 1965 conviction for violation of California's oral copulation statute.

In 1965, a jury found petitioner guilty of the substantive offense, and he received a suspended sentence and two years' probation. Execution of the probation order was stayed pending direct appeal and habeas corpus proceedings in the lower federal courts. The conviction was affirmed by the California Court of Appeal in an unpublished opinion filed September 16, 1968. When the California Supreme Court denied a petition for hearing on November 13, 1968, this petitioner took an appeal to this Court. On May 26, 1969, this Court dismissed the appeal for want of jurisdiction and, treating the appeal papers as a petition for a writ of certio-

rari, denied certiorari as well. *Shaw v. California,* 395 U.S. 211, 23 L.Ed.2d 213, 89 S.Ct. 1772 (1969).

Thereafter this petitioner filed a petition for a writ of habeas corpus in the United States District Court for the Central District of California. After the district judge made an independent examination of the state court record, he concluded:

> "Since all questions raised here have been considered and decided by the [California] District Court of Appeal, and since we agree completely with that court's conclusions, we can do no better than to adopt, as our own, the District Court of Appeal's opinion in so far as it relates to the questions here raised." *Shaw v. Pitchess,* 324 F.Supp. 781 (C.D. Cal. 1969).

It should be noted that the district court's order was a summary dismissal in that neither a return nor any other informal response was requested from petitioner's custodian. The United States Court of Appeals for the Ninth Circuit agreed with the district court that the California court has adequately disposed of the issues raised in this case. Accordingly, the Ninth Circuit affirmed the order denying the petition for a writ of habeas corpus. *Shaw v. Pitchess,* 440 F.2d 412 (9th Cir. 1971).

Statement of Facts

This case involves various legal issues arising out of petitioner's conviction for participating in an act of oral copulation which took place in an open toilet stall within the public restroom of a restaurant. Richard Allen Huddleston, the manager of Coffee Dan's restaurant in Santa Monica, California, contacted the police

department of that city and complained about homosexuals using the restaurant's restroom as a meeting place. [Rep. Tr. p. 31.] At the suggestion of the police, Mr. Huddleston had the door to the toilet stall in the men's restroom removed, leaving the toilet enclosed on three sides only. A false ventilator aperture was placed in the wall of the restroom. This louvered opening permitted visual observation of the restroom from a refrigeration room on the other side of the wall. The police were given access to the refrigeration room to conduct a surveillance of persons frequenting the restroom [*See* Rep. Tr. pp. 32, 35-36, 93, 95, 98, 102, 104, 144, 183.]

On March 19, 1965, Officers Sutter and Sullivan of the Santa Monica Police Department were on duty in the refrigeration room of the restaurant. [Rep. Tr. pp. 93, 144, 183.] At about 11:55 p.m., Officer Sutter was looking through the false vent into the men's restroom and observed petitioner enter the restroom. Petitioner walked directly to the commode area, lowered his trousers, and sat on the toilet. [Rep. Tr. pp. 102, 104.] About five minutes later, codefendant Peralta entered the restroom and went to the urinal. While codefendant Peralta stood at the urinal, he kept looking over his left shoulder in the direction of petitioner who remained seated on the toilet. [Rep. Tr. pp. 104-105.] After about 20 seconds had elapsed, codefendant Peralta turned toward petitioner and began massaging his own penis. [Rep. Tr. p. 106.] Petitioner dropped his trousers to the floor and also began massaging his penis. [Rep. Tr. pp. 107, 108.] Appellant also made gestures with his tongue, sticking it out and drawing it back into his mouth. [Rep. Tr. p. 109.]

At this point another man entered the restroom. Codefendant Peralta placed his penis back in his trousers and moved to the wash basin. Petitioner stopped massaging his penis and remained on the commode. [Rep. Tr. p. 110.]

When this third man left the restroom, codefendant Peralta returned to the urinal. The two men resumed masturbating. [Rep. Tr. p. 216.] Petitioner made a third gesture with his tongue. Codefendant Peralta walked along the north wall of the restroom. Upon reaching petitioner, codefendant Peralta placed his hand behind petitioner's neck. Codefendant Peralta's penis entered petitioner's mouth, and petitioner orally copulated it. [Rep. Tr. pp. 111-113.]

After observing this activity for two to three seconds Officer Sutter and his partner went into the restroom. [Rep. Tr. pp. 113-114.] They found petitioner and codefendant Peralta by the commode. [Rep. Tr. p. 201.]

The two officers, one after the other, advised both petitioner and codefendant Peralta that they had the right to remain silent, that they had the right to an attorney at all stages of the proceedings, and that anything that they might say could be used against them in criminal proceedings.* [Rep. Tr. pp. 141, 144-145.] Both men indicated that they understood this advice. [Rep. Tr. p. 147.]

About fifteen minutes later, in the booking area of the Santa Monica jail [Rep. Tr. p. 148], petitioner was asked if codefendant Peralta had solicited him in

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*The trial of this case preceded *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694, 86 S.Ct. 1602 (1966), and the guarantees as recited by the officers complied with the requirements of *People v. Dorado*, 62 Cal. 2d 338, 42 Cal. Rptr. 169, 398 P.2d 361 (1965).

the men's room. Petitioner replied, "Well, yes. Any time you go in there somebody is always showing you something." [Rep. Tr. pp. 149-150.] When codefendant Peralta was similarly asked if petitioner had solicited him, Peralta replied, "Well, yes. He was playing with hisself [*sic*]." [Rep. Tr. p. 153.] Those statements were freely and voluntarily made. Neither defendant was in the presence of the other at the time he made his own statement to the police. [Rep. Tr. pp. 148, 152.]

ARGUMENT

I

This Petition Does Not Present Any Important Questions of Law

The issues presented in this petition were all raised in the jurisdictional statement filed in connection with this petitioner's attempted appeal in 1969. Without requesting a response from the Attorney General of the State of California, this Court dismissed the 1969 appeal for want of jurisdiction and, treating the appeal papers as a petition for a writ of certiorari, denied certiorari as well. *Shaw v. California*, 395 U.S. 211, 23 L.Ed. 2d 213, 89 S.Ct. 1772 (1969). Respondent submits that a new bottle and two years of aging have not improved the vintage of the wine.

A. The Asserted Lack of Jurisdiction Because of a Defect in the Felony Complaint Filed With the Magistrate Is a Clearly Frivolous Issue

Petitioner contends that the felony complaint upon which the California magistrate conducted the preliminary examination was defective and that this defect deprived the California courts of all further jurisdiction over his person in the criminal proceedings which ensued. (Petn., pp. 10-12.) Respondent submits that petitioner's argument is based upon a misconception of the applicable law.

Petitioner argues that the felony complaint was insufficient to support a warrant of arrest. (Petn., pp. 10-11.) This argument pointedly ignores the fact that no warrant of arrest was issued upon the complaint. *See Shaw v. Pitchess*, 324 F.Supp. at 785. In this case, petitioner was arrested without warrant pursuant to California Penal Code section 836(1), which provides that a peace officer may arrest without warrant when-

ever "he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence." Thereafter petitioner was taken before a magistrate as required by the following language of California Penal Code section 849(a):

> "When an arrest is made without a warrant by a peace officer or private person, the person arrested, if not otherwise released, must, without unnecessary delay, be taken before the nearest or most accessible magistrate in the county in which the offense is triable, and a complaint stating the charge against the arrested person, must be laid before such magistrate."

Under the circumstances of this case, the only functions served by the felony complaint were (1) to give the accused notice of the crime charged against him and (2) to confer jurisdiction upon the magistrate to hold a preliminary examination. *See Shaw v. Pitchess, supra*, 324 F.Supp. at 785, and Cal. Pen. Code §859. The complaint was fully sufficient for these purposes.

In any event, even if there was a defect in the process leading to this petitioner's commitment for trial, a defect at this stage did not deprive the superior court of jurisdiction to try petitioner on the felony charge, did not operate to deny him a fair trial, and did not undermine the judgment of conviction entered in his case. It is the general rule that defects in the arrest or commitment procedures are not grounds for habeas corpus relief unless the accused is deprived of a fair trial as a consequence. *See, e.g., Hernandez v. Schneckloth*, 425 F.2d 89, 91 (9th Cir. 1970); *Abraham v. Wainwright*, 407 F.2d 826, 828 (5th Cir. 1969). *Cf. Stallings v. Splain*, 253 U.S. 339, 343, 64 L.Ed. 940, 40 S.Ct. 537 (1920).

B. California Penal Code Section 288a Is Not Unconstitutional as Applied to This Petitioner's Act of Oral Copulation Performed in a Public Restroom

Petitioner contends that California Penal Code section 288a is unconstitutional because its reach may extend to acts of oral copulation performed by consenting adults in various private settings. (*See* Petn., p. 12.) Unfortunately for this petitioner, the facts of this case do not arise in that context. The sex act in question here was performed in a public restroom, not in the privacy of petitioner's home. What a person knowingly exposes to the public can hardly be the subject of a constitutionally protected privacy interest. *Cf. Katz v. United States,* 389 U.S. 347, 351, 19 L.Ed.2d 576, 88 S.Ct. 507 (1967).

Furthermore, in the exercise of the police power, each state has the right to enact laws to promote public health, safety, morals and welfare. *Lochner v. New York*, 198 U.S. 45, 53, 49 L.Ed. 937, 25 S.Ct. 539 (1905). Penal statutes proscribing illicit sexual contacts constitute a legitimate and proper exercise of that power. *See* concurring opinions of Mr. Justice Goldberg and Mr. Justice Harlan in *Griswold v. Connecticut,* 381 U.S. 479, 498-99, 505, 14 L.Ed.2d 510, 85 S.Ct. 1678 (1965). Unquestionably, it is a valid exercise of the police power to apply the criminal sanction to the type of public conduct in which this petitioner engaged.

C. The Surreptitious Observation of Petitioner's Conduct Did Not Violate His Fourth Amendment Rights

Petitioner contends that he had a reasonable expectation of privacy within the toilet stall when he engaged in the act of oral copulation and that police observation of the act through the false vent violated his Fourth

Amendment rights. (Petn., pp. 15-17.) Respondent submits that this contention is so clearly without merit that it cannot present a substantial question for decision by this Court.

Petitioner engaged in the act of oral copulation in an open toilet stall, *i.e.*, one enclosed only on three sides. Thus, his conduct was not only observable by the police conducting a surveillance through the false vent but also to any patron of the restaurant who had occasion to use the restroom facilities. The holding of the United States Court of Appeals for the Ninth Circuit in *Smayda v. United States,* 352 F.2d 251 (9th Cir. 1965), *cert. denied,* 382 U.S. 981, 15 L.Ed.2d 471, 86 S.Ct. 555 (1966), appears to be dispositive of the issue presented here. Under circumstances similar to those presented in this case, the Court of Appeals held that a discreet surveillance of a public restroom did not amount to an "unreasonable search" under the Fourth Amendment. (*Id.* at 254-59.) This holding is consistent with the language employed by this Court in *Katz v. United States, supra,* 389 U.S. at 351: "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . ." One can scarcely entertain a reasonable expectation of privacy when he performs an illicit sex act in an open toilet stall.

D. The Application of the Harmless Error Test to the Admission of Codefendant Peralta's Statement Is Clearly Controlled by Settled Federal Law

Petitioner contends that the California and lower federal courts erred in holding that the admission of codefendant Peralta's statement implicating petitioner was harmless error under *Chapman v. California,* 386

U.S. 18, 24, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967). Respondent submits that this Court's decision in *Harrington v. California,* 395 U.S. 250, 23 L.Ed.2d 284, 89 S.Ct. 1726 (1969), is controlling on this point.

In this case, an extrajudicial statement made by co-defendant Peralta and tending to implicate petitioner was admitted under circumstances amounting to a violation of the rule enunciated in *Bruton v. United States,* 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). But, as in the *Harrington* case, the admission of the co-defendant's statement was merely cumulative of other overwhelming evidence pointing to petitioner's guilt. Petitioner himself made an extrajudicial statement which was also admitted into evidence and which was equally incriminatory. *See Harrington v. California, supra,* 395 U.S. at 253-54. The testimony of the surveilling police officer as to petitioner's participation in the proscribed acts was uncontradicted. Petitioner offered no defense whatsoever. Under these circumstances, the lower courts correctly concluded that the *Bruton* error was harmless beyond a reasonable doubt.

II

There Is No Conflict of Decisions

Petitioner argues that this Court should grant certiorari to resolve what he conceives to be a conflict between *Smayda v. United States, supra,* 352 F.2d 251 (9th Cir. 1965), and *Cotner v. Henry,* 394 F.2d 873 (7th Cir.) *cert. denied,* 393 U.S. 847, 21 L.Ed.2d 118, 89 S.Ct. 132 (1968). (*See* Petn., p. 9.) Respondent submits, however, that these decisions are not in conflict but merely announce two different rules governing two separate and distinct factual situations.

As discussed above, the *Smayda* decision holds that there is no violation of Fourth Amendment rights where homosexual activities in a public restroom become the object of a clandestine surveillance. In contrast, *Cotner v. Henry, supra,* held that the Indiana sodomy statute was unconstitutional as applied to a consensual act between husband and wife in the privacy of their own home. The wide divergence of the subject matter involved in these two cases thus occasions no conflict appropriate for resolution by this Court.

Conclusion

For the foregoing reasons, respondent urges that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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